IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63808-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
THOMAS PATRICK RANDALL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 26, 2010
	)	

Lau, J. — Thomas Randall appeals his conviction for first degree theft, arguing the court's knowledge instruction constituted an impermissible comment on the evidence and his exceptional sentence was unsupported by the jury's verdict. Because the knowledge instruction does not impermissibly comment on the evidence and facts found by the jury support the exceptional sentence, we affirm.

FACTS

Thomas Randall was convicted of first degree theft based on allegations that while acting as his grandmother's attorney-in-fact[1] and cotrustee of her revocable living

[1] On September 22, 2003, Elizabeth Randall executed a "General Power of

trust, he depleted her bank accounts and transferred her real property without authorization. Specifically, Randall transferred Elizabeth's[2] Port Hadlock house, valued at approximately $225,000, to his girl friend, Daphne Eastman, and sold a Marrowstone Island property to Eastman's parents for $33,000. Randall conveyed both properties by quitclaim deed. But when Elizabeth's son-in-law confronted Eastman with copies of the deeds, she stated she did not know what they were. As to the bank accounts, Randall admitted withdrawing $130,494 from Elizabeth's accounts[3] and charging $44,000 in shopping expenses, $29,000 in auto expenses, and $14,000 for groceries to her US Bank card between December 23, 2003, and December 14, 2005. The jury found as aggravating factors that the crime was a major economic offense and that Randall knew or should have known that Elizabeth was particularly vulnerable or incapable of resistance. The jury found Randall not guilty of witness tampering.

The court gave the following knowledge instruction, based on 11 Washington Practice: Washington Pattern Jury Instructs: Criminal 10.02 (3d ed. 2008 (WPIC):

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required

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Attorney" in Randall's favor that became effective on her disability. An "Authorization of Attorney-in-Fact of Elizabeth Randall" executed the same day empowered Randall to act as her attorney-in-fact immediately.

[2] For clarity we use only Elizabeth Randall's first name.

[3] Randall maintained that the withdrawals "could have been [made by] Daphne, it could have been me, or it could have been me with my grandmother," but conceded that Daphne would only withdraw funds with his permission. RP (Apr. 6, 2009) at 184.

to find that he or she acted with knowledge of that fact.

(Emphasis added.) The court's instruction omitted half of the first sentence from WPIC 10.02. That WPIC reads, in full,

> A person knows or acts knowingly or with knowledge with respect to a [fact] [circumstance] [or] [result] when he or she is aware of that [fact] [circumstance] [or] [result]. [It is not necessary that the person know that the [fact] [circumstance] [or] [result] is defined by law as being unlawful or an element of a crime.]
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> [When acting knowingly [as to a particular fact] is required to establish an element of a crime, the element is also established if a person acts intentionally [as to that fact].]

WPIC 10.02. Randall did not object to the instruction.

In addition, special verdict form C stated, "Did the victim know, or should have known, that the victim was particularly vulnerable or incapable of resistance?" (Emphasis added.) The parties agree that the verdict form should have instructed, "Did the defendant know, or should have known . . . ."

ANALYSIS

Comment on the Evidence

Randall first argues that the court impermissibly commented on the evidence by instructing the jury, "A person knows or acts knowingly with respect to a fact, circumstance or result." Specifically, he maintains that this instruction resolved the disputed factual issue of his knowledge thereby violating article IV, section 16 of the Washington Constitution.

Under article IV, section 16, a judge shall not convey to a jury "his or her

personal attitudes toward the merits of the case," State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997), or instruct a jury that "'matters of fact have been established as a matter of law.'" State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). Judicial comments on jury instructions are presumed prejudicial. Levy, 156 Wn.2d at 726. The burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. Levy, 156 Wn.2d at 726.

Randall relies on several cases that found impermissible judicial comment where instructions resolved factual matters. For example, in Becker, the court held that the trial court's special verdict form removed a disputed fact issue from the jury's consideration because it instructed the jury to decide whether the defendants were "'within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School at the time of the commission of the crime[.]'" Becker, 132 Wn.2d at 64. The Becker court held that the "to-wit" instruction was an impermissible comment on the evidence because whether the Youth Employment Education Program was a school was an issue of fact for the jury. Becker, 132 Wn.2d at 64.

And in Levy, the defendant challenged the "to convict" instructions on the ground that they constituted an impermissible comment on the evidence by referencing the victims' names and including the following "to-wit" references: (a) "the defendant, or an accomplice, entered or remained unlawfully in a building, to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA;" (b) "the defendant or an accomplice in the crime charged was armed with a deadly weapon, to-wit: a .38

revolver or a crowbar;" (c) "the defendant, or an accomplice, unlawfully took personal property to-wit: jewelry . . . ." Levy, 156 Wn.2d at 716 (emphasis omitted). The court held that the instruction on the apartment and crowbar was a judicial comment because it improperly suggested to the jury that an apartment was a building as a matter of law and the reference to the crowbar told the jury that it need not consider whether it qualified as a deadly weapon.[4] Levy, 156 Wn.2d at 721–22. But the court concluded that there was no prejudice because "the jury could not conclude that [the] apartment was anything other than a building" and because the Jury found that the defendant did not possess the crowbar. Levy, 156 Wn.2d at 726. Finally, in State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), the court held that the court impermissibly commented on the evidence where the jury instruction referenced the victim's birth dates, a critical element of the crime.

In sum, those courts concluded the jury instructions or verdict form constituted a judicial comment on the evidence because they "resovle[d] a disputed issue of fact that should have been left to the jury" or instructed the jury that "matters of fact have been established as a matter of law" thereby relieving the State of its burden of proof. State v. Eaker, 113 Wn. App. 111, 118, 53 P.3d 37 (2002); Levy, 156 Wn.2d at 721; see also Becker, 132 Wn.2d at 66 ("By informing the jury in the special verdict form that the Youth Education Program is a school, the trial court essentially resolved that factual issue."). In contrast, the instruction given here—"A person knows or acts knowingly

[4] The court held that the instruction on the revolver and jewelry was not a judicial comment.

with respect to a fact, circumstance or result"—does not establish or resolve the disputed fact of Randall's knowledge. While the instruction gives an incomplete knowledge definition and may be confusing, it imparts nothing substantive to the jury. And Randall does not assign error to the instruction on the ground that it misstates the law or is misleading. Nor could he as he failed to object to the instruction below when it could easily have been cured. See State v. Dent, 123 Wn.2d 467, 477–78, 869 P.2d 392 (1994) ("An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude."). In addition, we note that our Supreme Court has held that there is no requirement "that the jury be instructed on the meaning of 'knowledge' when the word is used to define a criminal offense." State v. Scott, 110 Wn. 2d 682, 692, 757 P.2d 492 (1988).

Furthermore, we review a challenged jury instruction de novo in the context of the instructions as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Here, the jury was instructed,

> Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

The jury was also instructed to consider the instructions as a whole. Jurors are presumed to follow a court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). We conclude no impermissible comment occurred here based on the court's incomplete knowledge instruction.

Exceptional Sentence

Randall next argues that the exceptional sentence was unsupported by the jury's verdict because the jury did not find that Randall knew Elizabeth was particularly vulnerable. Specifically, Randall argues that because the special verdict form on the "particularly vulnerable" aggravating factor asked, "Did the victim know, or should have known, that the victim was particularly vulnerable or incapable of resistance?" instead of "Did the defendant know . . . ," "there is no jury verdict regarding Randall's knowledge." (Emphasis added.) Br. of Appellant at 15.

"'[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). In Blakely, the Court clarified that the "statutory maximum" is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303 (emphasis omitted).

In view of the jury instructions and the entire verdict form, the jury unmistakably returned a verdict that Randall—and not the victim—knew the victim was particularly vulnerable. First, the verdict form clearly referenced the defendant, stating,

> We, the jury, having found the defendant guilty of Theft in the First Degree as defined in Instruction 13, return a special verdict by answering as follows:
>
> Did the victim know, or should have known, that the victim was particularly vulnerable or incapable of resistance?

(Emphasis added.) Second, instruction 14 instructed the jury to determine "[w]hether

the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance." (Emphasis added.) Similarly, instruction 18 provided that the State

> must prove beyond a reasonable doubt that the defendant knew or should have known that the alleged victim of the current offense, Elizabeth Randall, was particularly vulnerable or incapable of resistance due to advanced age, disability, or ill health.

(Emphasis added.) And the third amended information alleged the "particularly vulnerable" aggravating factor, stating,

> The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to advanced age, disability or ill health and this vulnerability was a substantial factor in the offense . . . .

(Emphasis added.)

Based on the verdict form, the instructions to the jury, and the amended information—all of which reference the defendant—there can be no doubt that the fact question of Randall's knowledge was properly submitted to the jury and that the jury found it was proved beyond a reasonable doubt. See Blakely, 542 U.S. at 301. As such, the exceptional sentence was based on facts found by the jury. Randall's Blakely violation claim fails.

Randall next argues that State v. Williams-Walker, 167 Wn. 2d 889, 225 P.3d 913 (2010), supports his position. In that consolidated case, the special verdict forms submitted to and approved by the jury asked the jury only if the defendants were "'armed with a deadly weapon . . . .'" Williams-Walker, 167 Wn. 2d at 893 (emphasis omitted). The trial court, however, imposed the five-year firearm sentence

enhancement, instead of the two-year deadly weapon enhancement. Williams-Walker, 167 Wn. 2d at 893–95. The court held that this resulted in sentences unsupported by the jury's findings, thus violating the defendant's jury trial right. Williams-Walker, 167 Wn. 2d at 899–900. But the special verdict form typographical error here bears no similarity to the erroneous sentence imposed by the trial court in Williams Walker.

Finally, Randall asserts that State v. Rooth, 129 Wn. App. 761, 121 P.3d 755, (2005), establishes that accepting the State's argument requires impeaching the jury's verdict. That case held "any evidence that a juror misunderstood or failed to follow the court's instructions inheres in the verdict and may not be considered." Rooth, 129 Wn. App. at 772. But the State does not rely on evidence that the jury "misunderstood or failed to follow the court's instructions."

We affirm Randall's conviction and sentence.

WE CONCUR: